In The

Supreme Court of the United States

October Term, 1995

STATE OF OHIO,

Petitioner,

v.

ROBERT D. ROBINETTE,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES POLICE OFFICERS TO INFORM MOTORISTS, LAWFULLY STOPPED FOR TRAFFIC VIOLATIONS, THAT THE LEGAL DETENTION HAS CONCLUDED BEFORE ANY SUBSEQUENT INTERROGATION OR SEARCH WILL BE FOUND TO BE CONSENSUAL?

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The Decision and Opinion of the Court Of Appeals Of Montgomery County, Ohio Second Appellate District, filed April 15, 1994, is unreported and is reproduced at App. 15.

The Decision and Order of the Common Pleas Court Of Montgomery County, Ohio, filed March 8, 1993, in Case No. 92-CR-2800 is unreported and is reproduced at App. 24.

JURISDICTIONAL STATEMENT

The Opinion of the Ohio Supreme Court was entered on September 6, 1995. (App. 1). Jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Constitution: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The issue in this case is whether the aura of police authority is so great that the driver of a car, stopped for a traffic violation, remains seized after the completion of the business of the stop, unless the officer informs the motorist that he, or she, is free to go. The Ohio Supreme Court has held that absent such a recitation, a motorist's consent to answer questions or to allow a search, will always be deemed to be coerced.

On August 3, 1993 Deputy Roger Newsome of the Montgomery County Sheriff's Office in Dayton, Ohio, stopped Robert Robinette for driving 69 miles per hour in a 45 mile per hour construction zone on Interstate Route 70. Deputy Newsome was part of a drug interdiction project, and he testified that he routinely asked permission to search the cars he had stopped for speeding violations. After giving Robinette an oral warning about his speed, Newsome returned Robinette's license, and asked him if he had any drugs or contraband in the car.

Robinette told Newsome that he did not have anything illegal in his car. Deputy Newsome then asked Robinette if he could search the car. Robinette agreed. Deputy Newsome found illegal narcotics in the car. (Most of the encounter between Robinette and Newsome was videotaped by Newsome, using a stationary camera.) Robinette was subsequently charged with the crime of

Drug Abuse in violation of Ohio Revised Code 2925.11, a felony of the fourth degree.

Robinette's attorney filed a motion to suppress the evidence arguing that Newsome's actions violated the Fourth Amendment. (Copy of Motion attached at App. 27). After an evidentiary hearing at which the videotape was admitted, the trial court overruled Robinette's motion to suppress and held that, under the totality of the circumstances, his Fourth Amendment rights were not violated. The court cited *United States* v. *Mendenhall*, 466 U.S. 544 (1980). The trial court went on to reject Robinette's claim that he was unaware that he could refuse the officer's request to search, stating:

> Although the Constitution does not require proof of knowledge of a right to refuse as the sine-qua-non of an effective consent to search . . . such knowledge was highly relevant to the determination that there had been consent. *Mendenhall*, supra. In the instant case, again, however, the videotape belies this claim. The manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer.

Robinette then entered a no-contest plea and was found guilty by the court. He appealed to the Ohio Second District Court of Appeals, which reversed the trial court, ruling that the search of the vehicle resulted from an unlawful detention.

In a 4-3 decision, the Ohio Supreme Court affirmed the Court of Appeals, and in so doing, created a bright

line test to be applied in certain Fourth Amendment contexts:

> The right, guaranteed by the federal and Ohio constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase, "At this time you legally are free to go" or by words of similar import.

This language found in the Court's Second Syllabus, is the holding of the case. Rule I, Ohio Supreme Court Rules for the Reporting of Opinions.

The State of Ohio asks this Court to review the ruling of the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

The Ohio Supreme Court has held below that in certain Fourth Amendment contexts, the question of whether the encounter is consensual or coerced is not to be determined by the totality of the circumstances. Instead, the encounter will be deemed coercive unless the law enforcement officer has informed the citizen that he or she, is free to go. The decision of the Ohio Supreme Court directly contradicts over twenty years of federal Constitutional jurisprudence. Whether contact by a police officer is consensual or is compelled cannot be determined by any single fact, and the Ohio Supreme Court errs in holding to the contrary.

This Court has consistently rejected attempts to import "bright line" standards to Fourth Amendment analysis. In case after case, in various aspects of Fourth Amendment review, this Court has refused to find that any one factor is determinative in deciding whether consent is voluntarily given or compelled. In *Florida* v. *Bostick*, 501 U.S. 429 (1991), this Court rejected Florida's attempt to impose a per-se rule preventing law enforcement officers from contacting bus passengers to obtain consent to search for illegal narcotics unless the officer possessed reasonable suspicion of criminal activity. Likewise, in *Michigan* v. *Chesternut*, 486 U.S. 567 (1988), this Court rejected the Michigan Court of Appeals' "bright line" rule that investigatory pursuits were seizures. In *Florida* v. *Jimeno*, 500 U.S. 248 (1991), this Court rejected Florida's attempt to establish a per-se rule concerning the scope of a consensual search. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1972), rejected the Ninth Circuit Court of Appeals' determination that the government must establish, as the *sine-que-non* of an effective consent, that the subject of the search knew that he had a right to refuse. *United States* v. *Sharp*, 470 U.S. 675 (1985), rejected an attempt to impose an outer limit standard of twenty minutes for investigative stops.

Furthermore, this Court has rejected any attempt to require proof that a person in question was aware of his right not to co-operate: whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to

decline the officers' requests or otherwise terminate the encounter." *Bostick*, at 439.

In *Bustamonte*, this Court said that "neither this Court's prior cases, nor the traditional definition of "voluntariness" requires proof of knowledge of a right to refuse as the sine-que-non of an effective consent to a search." *Bustamonte*, at 234. In *United States* v. *Mendenhall*, 446 U.S. 544 (1980), Justice Stewart wrote, that: "[o]ur conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed." Id. at 555.

Other jurisdictions that have faced the issue have not abandoned the totality of the circumstances. In *United States* v. *Werking*, 915 F.2d 1404 (10th Cir 1990), the court was faced with facts that are nearly identical to the facts of this case. The officer stopped Werking for a traffic violation, returned his papers to him, then asked him "if he was transporting firearms, narcotics, or large sums of money in the vehicle". Werking replied that he was not. Werking then agreed to allow the officer to look in the trunk of his car. Inside was seventy-five pounds of marijuana. Id. at 1407. The Tenth Circuit looked to the totality of the circumstances and found that the consent to search was voluntarily given. Id. at 1409. See also *United States* v. *Turner*, 928 F.2d 956 (10th Cir. 1991) cert. denied 502 U.S. 881 (1991); *United States* v. *Fernandez*, 18 F.3d 874 (10th Cir. 1994); *United States* v. *Rivera*, 906 F.2d 319 (7th Cir. 1990).

Ohio's bright line requirement would place people validly stopped for criminal violations in a superior position than those who have committed no violation. It would require police to inform a traffic detainee that he or she was free to decline the police's requests and terminate the encounter, but not to so inform those who have done nothing wrong.

This Court should grant review to specifically reject the Ohio Supreme Court's imposition of a bright line single factor test which conflicts with years of federal constitutional jurisprudence and leads to absurd results. This Court should grant the State of Ohio's Petition For Writ of Certiorari to reaffirm that when determining whether an encounter is consensual or coerced, the Fourth Amendment requires a review of all the circumstances, not an isolated fact.

CONCLUSION

Wherefore, for the above reasons, certiorari should be granted.

Respectfully submitted,

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December 5, 1995

THE STATE OF OHIO, APPELLANT, *v.*
ROBINETTE, APPELLEE.

[Cite as *State v. Robinette* (1995),
73 Ohio St.3d 650.]

Criminal law – Motor vehicles – Continued detention of a person stopped for a traffic violation constitutes on illegal seizure, when – Police officer required to inform motorist that his legal detention has concluded before the police officer may engage in any consensual interrogation.

1. When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure.

See: West's Ohio Digest, Automobiles 349(10, 17).

2. The right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

See: West's Ohio Digest, Automobiles 349(18).

(No. 94-1143 – Submitted May 24, 1995 –
Decided September 6, 1995.)

APPEAL from the Court of Appeals for
Montgomery County, No. 14074.

On August 3, 1992, appellee, Robert D. Robinette, was driving his car at sixty-nine miles per hour in a forty-five miles per hour construction zone on Interstate 70 in Montgomery County. Deputy Roger Newsome of the Montgomery County Sheriff's office, who was on drug interdiction patrol at the time, stopped Robinette for a speeding violation.

Before Newsome approached Robinette's vehicle, he had decided to issue Robinette only a verbal warning, as was his routine practice regarding speeders in that particular construction zone. Newsome approached Robinette's vehicle and requested Robinette's driver's license. Robinette supplied the deputy with his driver's license, and Newsome returned to his vehicle to check it. Finding no violations, Newsome returned to Robinette's vehicle. At that point, Newsome had no intention of issuing Robinette a speeding ticket. Still, Newsome asked Robinette to get out of his car and step to the rear of the vehicle. Robinette complied with Newsome's request and stood between his car and the deputy's cruiser. Newsome returned to his vehicle in order to activate the cruiser's video camera so that he could videotape his interaction with Robinette. Newsome returned to Robinette, issued a verbal warning regarding Robinette's speed, and returned Robinette's driver's license.

After returning the license, Newsome said to Robinette, "One question before you get gone [*sic*]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Newsome testified that as part of the drug interdiction project he routinely asked permission to search the cars be

stopped for speeding violations. When Robinette said that he did not have any contraband in the car, Newsome asked if he could search the vehicle. Robinette testified that he was shocked at the question and "automatically" answered "yes" to the deputy's request. Robinette testified further that he did not believe that he was at liberty to refuse the deputy's request.

Upon his search of Robinette's vehicle, Newsome found a small amount of marijuana. Newsome then put Robinette and his passenger in the back seat of the cruiser and continued the search. As a result of this extended search, Newsome found "some sort of pill" inside a film container. The pill was determined to be methylenedioxy methamphetamine ("MDMA") and was the basis for Robinette's subsequent arrest and charge for a violation of R.C. 2925.11(A).

Robinette's indictment was issued on December 18, 1992. On February 19, 1993, Robinette filed a motion to suppress the evidence found in the search of his vehicle. The trial court overruled the motion on March 8, 1993, finding that the deputy made clear to Robinette that the traffic matter was concluded before asking to search the vehicle. The court ruled that Robinette's consent did not result from any overbearing behavior on behalf of Newsome.

Robinette appealed. The Court of Appeals for Montgomery County reversed the trial court, holding that Robinette remained detained when the deputy asked to search the car, and since the purpose of the traffic stop had been accomplished prior to that point, the continuing

detention was unlawful and the ensuring consent was invalid.

This matter is before this court upon an allowance of a discretionary appeal.

Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, *Carley J. Ingram* and *Michael L. Gebhart*, Assistant Prosecuting Attorneys, for appellant.

James D. Ruppert, for appellee.

Betty D. Montgomery, Attorney General, *Richard A. Cordray*, State Solicitor, and *Simon B. Karas*, Deputy Chief Counsel, urging reversal for *amicus curiae*, Ohio Attorney General.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *William E. Breyer*, Assistant Prosecuting Attorney, urging reversal for *amicus curiae*, Ohio Prosecuting Attorneys Association.

Pfeifer, J. The issue in this case is whether the evidence used against Robinette was obtained through a valid search. We find that the search was invalid since it was the product of an unlawful seizure. We also use this case to establish a bright-line test, requiring police officers to inform motorists that their legal detention has concluded before the police officer may engage in any consensual interrogation.

In order to justify any investigative stop, a police officer "must be able to point to specific and articulable facts which, taken together with the rational inferences

from those facts, reasonably warrant that intrusion." *Terry v. Ohio* (1968), 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889, 906. Absent any additional articulable facts arising after the stop is made, the police officer must tailor his detention of the driver to the original purpose of the stop. *State v. Chatton* (1984), 11 Ohio St.3d 59, 63, 11 OBR 250, 253, 463 N.E.2d 1237, 1240.

In *Chatton*, the police officer stopped the defendant's car when he noticed it had no license plates. When he approached the car after it had pulled over, the officer saw a valid temporary tag in the car's rear window. Despite the fact that the original question which gave rise to the stop had been resolved, the officer approached the driver and asked to see his driver's license. A check of the license revealed that it was suspended, and the officer ordered the defendant out of his vehicle and placed him under arrest for driving with a suspended license. Upon searching the vehicle, the officer discovered a loaded revolver under the driver's seat. The defendant was charged with carrying a concealed weapon.

This court ruled in *Chatton* that the evidence resulting from the search should have been suppressed. This court reasoned that the officer, upon seeing the valid temporary tag, no longer maintained a reasonable suspicion that the defendant's vehicle was not properly licensed, and thus had no articulable reason to further detain the defendant to determine the validity of his driver's license. As a result, any evidence seized upon a subsequent search of the vehicle was inadmissible under the Fourth Amendment to the United States Constitution.

In this case, Newsome certainly had cause to pull over Robinette for speeding. The question is when the validity of that stop ceased. Newsome testified that from the outset he never intended to ticket Robinette for speeding. When Newsome returned to Robinette's car after checking Robinette's license, every aspect of the speeding violation had been investigated and resolved. All Newsome had to do was to issue his warning and return Robinette's driver's license.

Instead, for no reason related to the speeding violation, and based on no articulable facts, Newsome extended his detention of Robinette by ordering him out of the vehicle. Newsome retained Robinette's driver's license and told Robinette to stand in front of the cruiser. Newsome then returned to the cruiser and activated the video camera in order to record his questioning of Robinette regarding whether he was carrying any contraband in the vehicle.

When the motivation behind a police officer's continued detention of a person stopped for a traffic violation is not related to the purpose of the original, constitutional stop, and when that continued detention is not based on any articulable facts giving rise to a suspicion of some separate illegal activity justifying an extension of the detention, the continued detention constitutes an illegal seizure. *Chatton, supra.*

The entire chain of events, starting when Newsome had Robinette exit the car and stand within the field of the video camera, was related to the questioning of Robinette about carrying contraband. Newsome asked Robinette to step out of his car for the sole purpose of

conducting a line of questioning that was not related to the initial speeding stop and that was not based on any specific or articulable facts that would provide probable cause for the extension of the scope of the seizure of Robinette, his passenger and his car. Therefore the detention of Robinette ceased being legal when Newsome asked him to leave his vehicle.

However, this case contains a feature not discussed in *Chatton:* Robinette consented to the search of his vehicle during the illegal seizure. Because Robinette's consent was obtained during an illegal detention, his consent is invalid unless the state proves that the consent was not the product of the illegal detention but the result of an independent act of free will. *Florida v. Royer* (1983), 460 U.S. 491, 501, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229, 238. The burden is on the state to prove that the consent to search was voluntarily given. *Id.* at 497, 103 S.Ct. at 1324, 75 L.Ed.2d at 236. The factors used in consideration of whether the consent is sufficiently removed from the taint of the illegal seizure include the length of time between the illegal seizure and the subsequent search, the presence of intervening circumstances, and the purpose and flagrancy of the circumstances. *United States v. Richardson* (C.A.6, 1991), 949 F.2d 851, 858.

In this case there was no time lapse between the illegal detention and the request to search, nor were there any circumstances that might have served to break or weaken the connection between one and the other. The sole purpose of the continued detention was to illegally broaden the scope of the original detention. Robinette's consent clearly was the result of his illegal detention, and was not the result of an act of will on his part. Given the

circumstances, Robinette felt that he had no choice but to comply.

This case demonstrates the need for this court to draw a bright line between the conclusion of a valid seizure and the beginning of a consensual exchange. A person has been seized for the purposes of the Fourth Amendment when a law enforcement officer, by means of physical force or show of authority, has in some way restrained his liberty such that a reasonable person would not feel free to walk away. *United States v. Mendenhall* (1980), 446 U.S. 544, 553-554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509.

The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow.

The present case offers an example of the blurring between a legal detention and an attempt at consensual interaction. Even assuming that Newsome's detention of Robinette was legal through the time when Newsome handed back Robinette's driver's license, Newsome then said, "One question *before you get gone:* are you carrying any illegal contraband in your car?" (Emphasis added.) Newsome tells Robinette that before he leaves Newsome wants to know whether Robinette is carrying any contraband. Newsome does not ask if he may ask a question, he simply asks it, implying that Robinette must respond before he may leave. The interrogation then continues.

Robinette is never told that he is free to go or that he may answer the question at his option.

Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

We are aware that consensual encounters between police and citizens are an important, and constitutional, investigative tool. *Florida v. Bostick* (1991), 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389. However, citizens who have not been detained immediately prior to being encountered and questioned by police are more apt to realize that they need not respond to a police officer's questions. A "consensual encounter" immediately following a detention is likely to be imbued with the authoritative aura of the detention. Without a clear break from the detention, the succeeding encounter is not consensual at all.

Therfore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.

While the legality of consensual encounters between police and citizens should be preserved, we do not believe that this legality should be used by police officers to turn a routine traffic stop into a fishing expedition for unrelated criminal activity. The Fourth Amendment to the federal Constitution and Section 14, Article I of the Ohio Constitution exist to protect citizens against such an unreasonable interference with their liberty.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., WRIGHT and RESNICK, JJ., concur.

DOUGLAS F.E. SWEENEY, SR., J., dissenting. I am disturbed by the majority's requirement that police officers must now recite certain words before a consensual interrogation may begin. This "bright-line" test appears unique to Ohio and vastly undercuts our law enforcement's ability to ferret out crime. Furthermore, the majority's test is contrary to well-established state and federal constitutional law.

The United States Supreme Court has made it clear that not every encounter between a police officer and citizen is a seizure. *Florida v. Bostick* (1991), 501 U.S. 429, 434, 111 S.Ct. 2382, 2886, 115 L.Ed.2d 389, 398. Instead, the encounter becomes a seizure and is subject to Fourth Amendment scrutiny only when the encounter loses its consensual nature.[1] *Id.* Traditionally, the crucial test has

[1] Section 14, Article I of the Ohio Constitution is analogous to the Fourth Amendment to the United States Constitution.

always been "whether, taking into account all of the circumstances surrounding the encounter, the police conduct 'would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *Id.* at 437, 111 S.Ct. at 2387, 115 L.Ed.2d at 400. In other words, "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall* (1980), 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509. See, also, *State v. Childress* (1983), 4 Ohio St.3d 217, 4 OBR 534, 448 N.E.2d 155. The determination of whether consent has been freely given has always been a factual one, which, once made, should not be disturbed on appeal. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-2048, 36 L.Ed.2d 854, 862-863.

The United States Supreme Court has consistently applied this legal standard in cases dealing with consensual encounters. In fact, in *Bostick, supra,* the Supreme Court struck down a *per se* rule adopted by the Florida Supreme Court that all routine bus searches were unconstitutional. The Supreme Court remanded the case to the state court to apply the totality-of-the-circumstances test. More to the point of the facts of this case, in *Florida v. Jimeno* (1991), 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297, the court applied this legal standard to justify a consent to search following a traffic stop.

Indeed, courts from around the nation have had no problem in upholding the validity of consensual searches where consent was obtained after a traffic stop. See, *e.g., State v. C.S.* (Fla.App.1994), 632 So.2d 675; *State v. Bonham*

(1993), 120 Or.App. 371, 852 P.2d 905; *United States v. Werking* (C.A.10, 1990), 915 F.2d 1404.

Despite this well-established test, the majority now holds that before a police officer may engage in consensual interrogation, the officer must inform the individual that "at this time you legally are free to go." However, the United States Supreme Court has ruled that being informed of the right to refuse a search is but one factor to be taken into account when determining whether consent was freely given; it is not the "*sine qua non* of an effective consent." *Schneckloth, supra,* 412 U.S. at 227, 93 S.Ct. at 2048, 36 L.Ed.2d at 863. The distinction between being informed of the right to refuse a search and being informed of the right to leave the scene is insignificant. Whether the police officer uttered a warning is a relevant consideration, but it does not end the inquiry.

I would instead apply the totality-of-the-circumstances test to this case. Here, appellee was properly stopped and detained for speeding. After the traffic matter was concluded, the officer returned appellee's license. Appellee testified that he believed he was free to leave. At this point, the encounter between appellee and the police officer became an ordinary consensual encounter between a private citizen and a law enforcement officer. Since appellee's liberties were not curtailed and since he understood that he could leave, there was no "seizure" implicating state or federal constitutional guarantees. Appellee's consent should not be invalidated solely because it followed a traffic stop and simply because the police officer failed to warn appellee that he was free to do. The utterance of these "magic words" is but one factor for the fact-finder to consider when making the

determination as to whether consent was voluntarily given.

In *Mendenhall, supra,* at 554, 100 S.Ct. at 1877, 64 L.Ed.2d at 509, the United States Supreme Court lists other examples of circumstances that might indicate a seizure and, consequently, invalid consent: the threatening presence of several officers, display of a weapon, physical touching of the person, and the use of language or tone of voice indicating that compliance with the officer's request is compelled. None of these factors was present in this case. Appellee testified that the officer was nice to him at all times and never drew a weapon. Although appellee may have been intimidated or nervous, the officer's conduct did not rise to such a level as to make him believe he had to agree to the search.

As support for its holding, the majority relies on *State v. Chatton* (1984), 11 Ohio St.3d 59, 11 OBR 250, 463 N.E.2d 1237. However, *Chatton* is clearly distinguishable from the case. In *Chatton,* the police officer stopped the defendant for driving without license plates. Once the officer discovered that the vehicle displayed a temporary tag, which made his initial stop improper, the officer nevertheless detained the defendant and asked to see his license. The issue in *Chatton* was whether the police officer had continuing justification to detain the defendant. In this case, the issue is whether an individual who has been validly detained pursuant to a traffic stop may, in response to a police request, give a free and voluntary consent to search, once the traffic stop has been completed and the individual knows he is free to leave. Even the majority concedes that consent was not an issue in *Chatton.* However, the instant case turns entirely on the

use of consent. Thus, *Chatton* has little applicability to this case.

This technique of requesting consent following an initial valid detention is employed on a daily basis throughout this nation to interdict the flow of drugs. While I certainly do not advocate giving police officers carte blanche in their treatment of traffic violators, when the original stop is permissible, the police should be permitted to make inquires that are not coercive. The majority's bright-line test undercuts police authority and severely curtails an important law enforcement tool that is sanctioned by state and federal constitutional law.

For all those reasons, I would reverse the court of appeals and reinstate the trial court's judgment.

DOUGLAS and COOK, JJ., concur in the foregoing dissenting opinion.

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO
SECOND APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	Case No. 14074
	:	(T.C. Case No.
v.	:	92-CR-1800)
ROBERT D. ROBINETTE	:	
	:	
Defendant-Appellant	:	

OPINION

Rendered on the 15th day of April, 1994

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FAIN, J.

Defendant-appellant Robert D. Robinette appeals from his conviction and sentence for Drug Abuse. Robinette contends that the trial court erred by denying his motion to suppress. He contends that once the purpose for the investigative stop – in this case the issuance of a warning for speeding – had been satisfied, the officer could not lawfully detain him further for the purpose of

securing his consent to search for narcotics. We agree, based upon *State v. Retherford* (March 16, 1994), Montgomery App. No. 13987, unreported, which we approve and follow. Accordingly, the judgment of the trial court is *Reversed*, and this cause is *Remanded* for proceedings consistent with this opinion.

I

Robinette was traveling at 69 miles per hour on I-75 at a point where, because of construction, the speed limit had temporarily been posted at 45 miles per hour. Montgomery County Sheriff's Deputy Roger Newsome was stopping speeders at this location. He was merely giving them warnings, in an effort to keep the speed down to a safe level. He stopped Robinette for the purpose of giving a warning. Newsome admitted that he never had any suspicions concerning Robinette beyond giving him a warning for speeding. That was the sole purpose for the stop.

Before Newsome gave Robinette a warning, he went back to his cruiser and activated a video camera. He had Robinette stand in front of the cruiser. Immediately after giving Robinette a warning, with no pause or break in the conversation, Newsome asked Robinette if he was carrying any kind of contraband, including drugs, and Robinette said that he was not. Then Newsome asked for and received permission to search Robinette's car. The search disclosed some packets of marijuana in a total amount that is described as small, as well as a pill that was determined to be MDMA, or Ecstasy. Robinette was arrested and charged with Drug Abuse. Robinette moved

to suppress the evidence, contending that it was obtained as a result of an illegal search. The trial court denied the motion to suppress, holding that Robinette's consent to search was free and voluntary.

Following a denial of his motion to suppress, Robinette pled no contest, was found guilty, and was sentenced accordingly. From his conviction and sentence, Robinette appeals.

II

Robinette's sole Assignment of Error is as follows:

> THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT FAILED TO GRANT HIS MOTION TO SUPPRESS EVIDENCE OBTAINED SUBSEQUENT TO AN ILLEGAL DETENTION AND SEARCH OF APPELLANT AND HIS VEHICLE.

Robinette contends that after he was given a warning for speeding, the acknowledged purpose for the stop was satisfied. Robinette argues that, pursuant to *State v. Chatton* (1984), 11 Ohio St. 3d 59, and *Fairborn v. Orrick* (1988), 49 Ohio App. 3d 94, once the purpose for the stop had been satisfied and there was no subsequent reason to suspect Robinette, the investigative stop was over and there should have been no further detention for purposes of investigation. The State contends that Robinette was free to go, so that there was no detention.

We conclude that a reasonable person in Robinette's position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long

as the police officer was continuing to ask investigative questions.

An identical fact pattern involving the same officer was presented in *State v. Retherford* (March 16, 1994) Montgomery App. No. 13987, unreported. In that case, we held that once a police officer has issued a traffic citation or warning for a speeding violation, it is unreasonable to detain the motorist further for the purpose of obtaining consent to search for drugs or alcohol, absent a reasonable and articulable suspicion that the motorist is transporting either drugs or alcohol.

We approve and follow our holding in *State v. Retherford, supra*. Because the search in the case before us resulted from an unlawful detention, it is the fruit of an unlawful seizure, and the fact that Robinette, during the unlawful detention, may have consented to the search is immaterial.

Robinette's sole Assignment of Error is sustained.

III

Robinette's sole Assignment of Error having been sustained, the judgment of the trial court is *Reversed*, and this cause is *Remanded* to the trial court for further proceedings consistent with this opinion.

YOUNG, J., concurs.
WOLFF, J., dissenting:

In *State v. Pinder* (Dec. 15, 1993), Miami App. No. 93 CA 6, unreported, this court held that "a valid consent to

search cannot be given following an illegal detention to which it is strongly connected, and . . . evidence uncovered as a result of such a search must be suppressed as fruit of the poisonous tree." P. 10. In *Pinder*, the consent to search was obtained *during* the course of what the trial court implicitly found was an unlawful detention. P. 7. Hence, this court did not consider whether the consent was voluntary in fact (which the trial court had found it was not).

In *State v. Retherford* (Mar. 16, 1994), Montgomery App. No. 13987, unreported, this court considered a situation quite similar to the situation in this case. In *Retherford*, the trial court had found that after a lawful traffic stop, Deputy Newsome had told Retherford that she was free to leave, and that she was thus not in custody when Deputy Newsome then asked for permission to search her car. The trial court also found that thereafter Retherford had consented to the search of her vehicle. This court determined that the trial court erred in its determination that Retherford "was not seized (i.e., being detained) at the time Deputy Newsome asked for her consent to search her vehicle" because "a reasonable person in Retherford's place would (not) have felt 'free to leave' under the circumstances herein." Pp. 14-15. In other words, this court determined that Retherford's consent was obtained "during the course of an illegal detention", and, following *Pinder*, declined to address whether the consent to search was voluntary in fact but, rather, held that the fruits of the search should be suppressed as that of the poisonous tree. P. 24. Essentially, the court reasoned that when Deputy Newsome sought Retherford's

consent to search her car, she was still detained, notwithstanding the trial court's finding to the contrary, and that the detention was illegal because the traffic stop was concluded and there was no reasonable and articulable basis for continued detention of Retherford.

In this case, the majority chooses to follow *Retherford*, hold that Robinette's consent was obtained "during the unlawful detention", reverse on that basis, and not consider that his consent may have been voluntary in fact because that issue is immaterial given that the consent was obtained during an illegal detention.

In my judgment, the premise upon which the holdings in *Retherford* and in this case are based is flawed. That premise is that, as a matter of law, a reasonable person in these defendants' positions would not believe that the investigative stop had been concluded, and that he or she was free to go.

In addition to my own reservations about this premise, a recent article in the Dayton Daily News tends to belie the premise. Derek Ali, a black staff writer, wrote about three incidents in which he had been a victim of racial stereotyping. The first incident concerned a situation similar to the one presented here.

> Until the last quarter of 1993, I shrugged at suggestions from young black men and women who complained about receiving poor treatment based on how they're dressed.
>
> Normally, I wear suits six days a week and generally the people I come in contact with treat me in a respectful manner. Things changed on three separate occasions when I switched to a ball cap, sweats and sneakers.

* * *

> In October, a Franklin County sheriff's deputy stopped me along a stretch of Interstate 70, just outside of Columbus. She approached the car, asked me routine questions and took my driver's license.
>
> I thought nothing of the backup cruiser that pulled up until she returned to my car in what seemed like 20 minutes to inform me I would just get a warning. Before I could thank God for the blessing, the deputy asked permission to search my car for contraband.
>
> I wanted to say, yes, go ahead, check my car. Let the record reflect that an African-American can drive a major interstate without a trunkload of illegal drugs. *However, I declined the search and went on my way.*
>
> I thought little of the incident until later when a Dayton police officer told me I probably fit the sheriff department's profile of a drug runner – a young black male between 18 and 35 driving a late model vehicle from one major city to another.
>
> That's when I became almost as angry as younger blacks who say they're treated like criminals because of their age, dress or some other subjective information used to perpetuate stereotypes, prejudice and discrimination. "Discrimination wears thin – like an old sweatshirt", *Dayton Daily News*, March 6, 1994. (Emphasis mine.)

The relevance of this story to this appeal is simply that Mr. Ali, an obviously well educated individual who does

not appear to be a lawyer, believed that he was free to refuse the police officer's request to search his car.

The evidence in this case established that in the mind of Deputy Newsome, Robinette was "free to go" when he gave him a warning and returned his driver's license to him. Although Deputy Newsome did not tell Robinette he was free to go, Robinette, who has a bachelor of science degree in botany, answered "yes" to the prosecutor's question: "I believe you testified that Deputy Newsome returned your driver's license to you. And at that point you felt that you were free to leave; is that correct?"

In my judgment, the evidence supports a determination that Robinette was not being detained at the time he consented to the search of his car, and the trial court appears to have so found. As such, whether his consent was voluntary in fact is a material issue. The evidence amply supports the trial court's finding that Robinette's consent was voluntary in fact.

Constitutional mischief only occurs when the consent to search, voluntary or not, is obtained during the course of an illegal detention. If the detention has ceased, and a subsequent consent to search is voluntary in fact, the fruits, if any, of the search are not those of the poisonous tree. I am not persuaded that trial judges cannot determine on a case-by-case basis whether and, if so, when detention has come to an end vis-a-vis a request to search.

Because the evidence supports a determination that the consent was voluntary in fact, and was not obtained during the course of an illegal detention, I would affirm.

Copies mailed to:

CARLEY J. INGRAM
JAMES D. RUPPERT
HON. JOHN W. KESSLER

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

CRIMINAL DIVISION

THE STATE OF OHIO,	:	CASE NO. 92-CR-2800
Plaintiff,	:	(Judge John W. Kessler)
-vs-	:	DECISION AND ORDER
ROBERT D. ROBINETTE,	:	
Defendant.	:	

This case is before the Court on Defendant's Motion to Suppress evidence and statements.

The testimony of the witnesses at the suppression hearing establish that on August 3, 1992, Defendant was stopped by Montgomery County Sheriff's Deputy Newsom on I-70 at Diamond Mill Road for driving 69 MPH in a 45 MPH limit construction zone. Deputy Newsom was part of a unit directed to interdict potential contraband carriers on the highways in and around Dayton. Absent probable cause to search or an admission of criminal conduct, the unit's suggested procedure was for the investigating officer to attempt to gain the detained suspect's consent to search.

In this case, Deputy Newsom, upon his traffic stop, decided to merely issue a verbal warning to Defendant concerning his speeding violation, but also to continue investigating Defendant by asking if Defendant had any contraband or guns in his car. Upon a negative response from Defendant, Newsom requested permission to search

the car, which was granted by Defendant, and a subsequent seizure of contraband occurred.

The question presented to this Court for determination is the validity of the consent given by Defendant. "The question whether the [Defendant's] consent – was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances – and is a matter which the government has the burden of proving." *U.S. v. Mendenhall*, 466 U.S. 544 (1980).

The Court in the instant case is greatly aided by a video tape of the encounter between Deputy Newsom and Defendant. Ordinarily this Court would find the "custodial status" of the Defendant in the midst of a traffic arrest to be of great significance to the issue. Here, however, prior to the inquiry about contraband possession or consent, the officer made it clear to Defendant that the traffic matter was concluded.

Defendant claims he was unaware that he could refuse the officer's request to search. "Although the Constitution does not require proof of knowledge of a right to refuse as the sine-qua-non of an effective consent to search . . . such knowledge was highly relevant to the determination that there had been consent." *Mendenhall, supra*. In the instant case, again, however, the video tape belies this claim. The manner of inquiry, the phrasing of the request and the position of the parties eliminates the suggestion of overbearance by the officer.

The above-stated circumstances coupled with the Defendant's education and intelligence cause this court to

find that Defendant's consent was valid and not the product of duress or coercion.

Defendant's Motion to Suppress is not well taken and is OVERRULED.

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

SO ORDERED:

JOHN W. KESSLER, JUDGE

JANET R. SORRELL, Assistant Prosecuting Attorney, Attorney for Plaintiff, Fifth Floor, 301 W. Third Street, Datyon, Ohio 45402 (513) 225-5757

JAMES D. RUPPERT, Attorney for Defendant, 1063 E. Second Street, P.O. Box 369, Franklin, Ohio 45005 (513) 746-2832

ASSIGNMENT OFFICE
TIM WALKER, Bailiff

**IN THE COURT OF COMMON PLEAS,
MONTGOMERY COUNTY, OHIO**

STATE OF OHIO,	)	
PLAINTIFF,	)	**CASE NO. 92-CR-280**
vs:	)	
ROBERT D. ROBINETTE,	)	**MOTION TO SUPPRESS**
DEFENDANT.	)	

Now comes the Defendant, Robert D. Robinette, by and through counsel, and respectfully moves this Court for an Order suppressing the use of the following as evidence:

1) A quantity of metlyenedioxy-meth-amphetamine (MDMA)

2) Any and all statements allegedly obtained from the Defendant regarding the above captioned case.

The basis for this motion is more fully articulated in the attached memorandum.

An oral hearing to develop a factual basis for and to present additional legal arguments in support of this Motion is hereby requested.

RUPPERT, BRONSON,
CHICARELLI & SMITH

/s/ James D. Ruppert
James D. Ruppert 0011817
Attorney for Defendant
1063 E. Second Street
P. O. Box 369
Franklin, OH 45005
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MEMORANDUM

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures. When a search is reasonable or unreasonable is a question to be decided by a judicial officer, not by a police officer. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Searches conducted outside the judicial process are "*per se* unreasonable", subjected only to specifically established and well defined exceptions which may not be expanded at an officer's whim. *Keith v. United States*, 357 U.S. 493 (1960).

In the case at bar, the officer went well beyond any recognized exception. The Defendant had been stopped due to an alleged speeding violation. Upon stopping the Defendant, the officer obtained Defendant's license. He then returned and asked the Defendant to step from the vehicle. The officer then returned to his cruiser and started the video and audio tape. At this point he returned to the Defendant who was waiting out of his vehicle, between the cars. The officer then informed Defendant that he was only going to give him a verbal warning and not issue a citation and stated that he was free to go.

It is at this point the officer violated the Defendant's rights. Attempting to make it look like an afterthought, the officer continued to detain the Defendant and question him about illegal drugs in the vehicle. The officer, at this point, was on a fishing expedition. He has no articulable reason for further detention of the Defendant.

In *State v. Chatton*, 11 Ohio St. 3d 59 (1984) the Ohio Supreme court clearly and unambiguously held that once an officer's reason for making a traffic stop has been

completed, he cannot then further detain the person. It is firmly established that the detention of an individual by a law enforcement officer must, at the very least, be justified by 'specific and articulable facts' indicating that the detention was reasonable. *Chatton*, 11 Ohio St. 3d at 61.

In the case at bar, the initial detention was reasonable as there was an alleged speeding violation. The rule in *Chatton*, however, precludes police officers from then engaging in unbridled activity. "[A]bandonmnt of effective judicial supervision of this kind of seizure . . . leaves police discretion utterly without limits." *Id.* at 62. Thus, the rule in *Chatton* not only requires an articulable reason for the initial stop but an articulable reason for any detention beyond that required for the initial stop. "Once a police officer has made a legitimate and constitutional stop of a vehicle, the driver and the vehicle may be detained *only* for as long as the officer continues to have a reasonable suspicion that there has been a violation of law." *State v. Myers*, 63 Ohio App. 3d 765, 771 (1990) (citing *Chatton*).

This rule has been meticulously applied. The Second Appellate District has stated that "the mere fact that a police officer has an articulable and reasonable suspicion sufficient to stop a motor vehicle does not give that police officer 'open season' to investigate matters not reasonably within the scope of his suspicion." *Fairborn v. Orrick*, 49 Ohio App. 3d 94, 95 (1988).

All of the cited cases are in accord. Once a police officer detains someone, the detention can only continue so long as there continues to be an articulable and reasonable suspicion. "If, after inspecting the vehicle or talking

to the driver, the police officer is satisfied that there has been no unlawful activity, the driver *must* be permitted to continue on his or her way." *Myers* 63 Ohio App. 3d at 771.

When one applies this rule to the case at bar, it is clear that the officer continued into an unlawful detention and search. He stopped the vehicle for a speeding violation. He satisfied himself concerning the violation and returned the license giving a verbal warning. He had no other "reasonable or articulable" suspicion" [sic] for continuing the detention. He had no right to further detain the Defendant so he could randomly question him concerning drugs. The officer, at this point, started a fishing expedition, which was based, at best, on a hunch. As such, anything obtained as a result must be suppressed pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1973).

The State will undoubtedly argue that the search was lawful as the Defendant allegedly consented to the search. This, however, misses the point and ignores the law. The issue of consent is not even an issue in this case. This is due to the simple fact that the officer had already violated the Defendant's rights. His continued detention and questioning of the Defendant violates the Fourth Amendment. The only reason the officer even asked to search the car was because he had unlawfully detained the Defendant in violation of *Chatton*. *See also, Myers*, 63 Ohio App. 3d at 771; *Orrick*, 49 Ohio App. 3d at 95.

Moreover, because the continued detention of the Defendant was unlawful, any statements made as a result of the continued questioning was obtained in violation of

the Defendant's rights. *Chatton*, 11 Ohio St. 3d at 59; *see also, Wong Sun*, 371 U.S. at 471.

Wherefore, the Defendant requests this Court for an Order suppressing any and all tangible evidence obtained in the instant case, as well as any oral or written statements made at the time of the Defendant's arrest.

/s/ James D. Ruppert
James D. Ruppert 0011817
Attorney for Defendant

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a true and accurate copy of the foregoing was mailed, postage prepaid, by ordinary U.S. Mail, to Janet Sorrell, Montgomery County Prosecutor's Office, 301 West Third Street, Dayton, OH 45402, this 18th day of February, 1993.

/s/ James D. Ruppert
James D. Ruppert 0011817
Attorney for Defendant